

FEDERAL CIRCUIT COURT OF AUSTRALIA

CHECHI v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 638

Catchwords:

MIGRATION – Migration Review Tribunal – Skilled Provisional (Class VC)
Visa – no jurisdictional error.

PRACTICE AND PROCEDURE – Summary dismissal – proceedings summarily dismissed.

Legislation:

Federal Circuit Court Act 1999, s.17A

Federal Circuit Court Rules 2001, r.13.10

Migration Act 1958, ss.5F, 476

Migration Regulations 1994, reg.1.12

Cases cited:

Spencer v the Commonwealth of Australia (2010) 241 CLR 118; [2010] HCA 28

Applicant:	DHARAM PAL CHECHI
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 410 of 2015
Judgment of:	Judge Street
Hearing date:	19 March 2015
Date of Last Submission:	19 March 2015
Delivered at:	Sydney
Delivered on:	19 March 2015

REPRESENTATION

The applicant appeared in person.

Solicitors for the Respondent: Mr T. Galvin
Minter Ellison

ORDERS

- (1) The proceeding before this Court, commenced by way of application filed on 20 February 2015, is summarily dismissed.
- (2) The applicant pay the costs of the first respondent fixed in the amount of \$1,367.

**FEDERAL CIRCUIT COURT
OF AUSTRALIA**

AT SYDNEY

SYG 410 of 2015

DHARAM PAL CHECHI

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This is an application within the Court's jurisdiction under s.476 of the *Migration Act 1958* seeking a Constitutional writ in respect of a decision of the Tribunal delivered on 23 January 2015 affirming a decision of the delegate not to grant the applicant a Skilled (Provisional) (Class VC) visa. The Tribunal noted that the applicant applied for the visa on 5 February 2010 and that at the time that the application was lodged (Class VC) contained two subclasses: 486 and 487. The completed application form indicated the relevant subclass in this case is (subclass 487) Skilled Regional Sponsored, the criteria for which is set out in Part 487 of Schedule 2 to the *Migration Regulations 1994*.

2. The Tribunal noted the primary criteria must be satisfied by at least one applicant. The delegate refused the application to grant a visa because the applicant did not satisfy clause 487.321 of Schedule 2 to the Regulations because he was no longer a member of the primary applicant's family unit at the time of the decision. The delegate's decision record indicates that the spousal relationship between the applicant and the primary applicant broke down in March 2012.
3. The applicant appeared before the Tribunal by telephone on 22 January 2015 to give evidence and present arguments. The hearing was assisted by the benefit of an interpreter, and the applicant was represented by his registered migration agent. The Tribunal noted the issue in this case of whether the applicant continues to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a (subclass 487) visa and whether he meets 487.321. "Member of a family unit" is defined in reg1.12 and includes a spouse of the family head. "Spouse" is defined in s.5F of the *Migration Act*. The applicant's spouse informed the Department on 21 March 2012 that the relationship had broken down and that they were now living separately:

8. At the hearing the applicant confirmed that the relationship between himself and Ms Chechi had broken down and they were living separately and apart. They had legally divorced about one and a half years ago. However, he was a member of her family unit at the time he had applied for the visa. His daughter was still living with Ms Chechi in Australia and the case was still before the Family Court. He needed the visa so he could continue having contact with his daughter. The applicant's representative asked the Tribunal to consider the matter on compassionate grounds.

9. On the basis of the information provided by the applicant at the hearing, the Tribunal finds that the applicant is not in a spousal relationship with Ms Chechi, the primary applicant, at And I will have set out paragraphs 8 and 9 of the Tribunal's decision. the time of the Tribunal's decision. The applicant told the Tribunal that he and Ms Chechi are now divorced. The Tribunal finds that the applicant and Ms Chechi are not married to each other under a marriage that is valid for the purposes of this Act; they are not in a genuine and continuing relationship; they do not live together; they live separately and apart on a permanent basis; and they do not have a mutual commitment to each other as husband and wife to the exclusion of all others.

4. The Tribunal noted in paragraph 10 as follows:

10. It therefore follows that the applicant is not Ms Chechi's spouse, as defined in s.5F, and is not a member of her family unit, as defined in r.1.12. Therefore, the applicant is not the member of a family unit of a person who satisfies the primary criteria for the visa. Given the above findings, the applicant does not satisfy cl.487.321.

5. The Tribunal noted there was no evidence the applicant meets any other criteria for the visa in his own right. The Tribunal considered the applicant's evidence in relation to his daughter and the submissions that were made on compassionate grounds. The Tribunal said it has no discretion to find the applicant meets the criteria on compassionate grounds. The Tribunal identified that a (subclass 485) visa required similar criteria in terms of the applicant continuing to be a member of a family unit of a person who satisfied the primary criteria. For the same reasons, the Tribunal found the applicant did not satisfy the requirements of a (subclass 485) visa. The grounds of the application were blank and the affidavit in support said the applicant was not satisfied with the decision.
6. It was in those circumstances the Tribunal found as a fact that the applicant did not satisfy the criteria for the grant of a (subclass 487) visa or (subclass 485) visa and affirmed the decision of the delegate. The application identified no grounds of jurisdictional error.
7. In the application provides that the Court may hear and determine all interlocutory or final issues, or may give directions for the future conduct of the proceedings. The Court raised with the applicant that the application appeared doomed to failure for want of any jurisdictional error. The applicant raised a concern as to looking out for his daughter and how proceedings in the Family Court might continue, but did not develop any argument that identified any ground for finding jurisdictional error in the decision of the Tribunal.
8. I take into consideration in respect to the Court's summary disposal powers under s.17A (*Federal Circuit Court Act 1999*) and r.13.01 (*Federal Circuit Court Rules 2001*) the principles and caution identified in *Spencer v the Commonwealth of Australia* (2010) 241 CLR 118; [2010] HCA 28 at [24]-[25] and [59]-[60].

9. I am clearly satisfied that the decision of the Tribunal was open on the material before the Tribunal and to the extent that it identified the constraints in respect of subclasses 485 and 487 was correct and was correct that there was no discretion in respect of the compliance with those criteria. The application identifies no grounds of error and there is no utility in granting an adjournment of proceedings that are doomed to failure. In those circumstances, it is clear that the application is doomed to failure. I am clearly satisfied the proceedings have no reasonable prospect of success. The proceedings are summarily dismissed.

I certify that the preceding nine (9) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 25 March 2015